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I am indebted to Professor Raymond Coletta of McGeorge School of Law, Professor Steven Eagle of George Mason School of Law, as well as James S. Burling, Robin L. Rivett, and M. Reed Hopper of PLF for their gracious comments.

WINDFALLS OR WINDMILLS: THE RIGHT OF A PROPERTY OWNER TO CHALLENGE LAND USE REGULATIONS (A CALL TO CRITICALLY REEXAMINE THE MEANING OF *LUCAS*)

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Table of Contents

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I. INTRODUCTION

In 1992, the United States Supreme Court held that state legislatures could not preclude property owners from making use of their property without compensation merely because state legislatures had declared the uses as nuisances.[1] The Court observed that limitations depriving owners of all beneficial use of their property "must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership."[2] The Court also stated that certain property uses are necessarily prohibited, such as developing property in such a manner that it floods other land, or building a nuclear generating plant on an earthquake fault.[3]

The meaning of this language seemed clear; regulations that do not inhere in background principles of nuisance and property law, and that deprive an owner of all beneficial use of their property, constitute a taking for which compensation is required.[4] As Justice Kennedy observed in his concurring opinion, "[i]f the Takings Clause is to protect against temporary deprivations, as well as permanent ones, its enforcement must not be frustrated by a shifting background of state law."[5]

Notwithstanding the *Lucas* opinion's apparent clarity, Justice Kennedy questioned the very basis for the Court's ruling in his concurring opinion. He criticized the Court for its reliance on nuisance law, which he described as "too narrow a confine for the exercise of regulatory power in a complex and interdependent society."[6] Justice Kennedy believed that a state should have the ability to enact new regulatory initiatives in response to changing conditions, and that courts must consider all reasonable expectations whatever their source.[7]

Justice Kennedy's comments marked the first challenge to a principle underlying the *Lucas* opinion—the thesis that a person acquires property subject to background principles of state property law. Many states would take this challenge further, arguing that a

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1. *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1029 (1992). See discussion *infra* notes 33-54 and accompanying text.

2. *Id.; see also* Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 161 (1980) ("[P]roperty interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . .") (citation omitted).

3. *See Lucas*, 505 U.S. at 1029.

4. *See id.* at 1029-30.

5. *Id.* at 1033 (Kennedy, J., concurring).

6. *Id.* at 1035 (Kennedy, J., concurring).

7. *See id.*

subsequent acquirer of property is precluded from challenging existing land use regulations, because all preacquisition restrictions become a part of the state's background principles of nuisance and property law.[8] This view of preexisting regulations may stem from confusion as to the clear meaning of *Lucas* and *Nollan v. California Coastal Commission*.[9] In addition, lower courts may have made a conscious decision to subvert the Supreme Court's *Nollan* and *Lucas* decisions in favor of policies that have the effect of severely restricting the Fifth Amendment's Taking Clause.[10] Whatever the reasons, a number of courts are not applying the *Lucas* and *Nollan* holdings.

One of the most extraordinary post-*Lucas* challenges to the Fifth Amendment occurred on February 18, 1997, when the New York Court of Appeals decided four cases, *Anello v. Zoning Board of Appeals of Village*,[11] *Gazza v. New York State Department of Environmental Conservation*,[12] *Basile v. Town of Southampton*,[13] and *Soon Duck Kim v. City of New York*.[14] These four cases illustrate the degree to which a state is willing to disregard the rights of private property owners by taking property without just compensation and ignoring constitutional imperatives in the process.[15]

The possibility that other states will follow the New York Court of Appeals leaves the Supreme Court with two possible responses. One response is for the Court to accept review of a case that questions whether a state can legislatively alter the definition of property in a way that deprives owners of valuable property without just compensation, or whether a state can preclude property owners from

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8. In *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 833 n.2 (1987), the Supreme Court noted that property rights are not altered because property is acquired after a restrictive policy is implemented.

9. *See id.*

10. For a discussion of the suggestion that courts are not following the *Nollan* and *Lucas* holdings, see Mark P. McIntyre, *The Taking of Single Lots—How New York's Wetland Laws Violate the U.S. Constitution*, 15 N.Y. ENVTL. L. 4, 31 (1995).

> By declining, so far, to revise the procedural rules that apply to New York wetland takings cases, the Court of Appeals, like many of its sister state high courts, has not changed state law to accommodate the property rights that the U.S. Supreme Court articulated in *Nollan* and *Lucas* . . . . Many state courts have reacted with skepticism and resistance to the Supreme Court's substantive due process approach to government regulation and private property . . . . California's reaction to emerging United States Supreme Court takings doctrine suggests a balkanization of regulatory takings law.

Id. at 31-32.

11. 678 N.E.2d 870 (N.Y. 1997). *See* discussion *infra* notes 173-81 and accompanying text.

12. 679 N.E.2d 1035 (N.Y. 1997). *See* discussion *infra* notes 182-99 and accompanying text.

13. 678 N.E.2d 489 (N.Y. 1997). See discussion *infra* notes 200-205 and accompanying text.

14. 90 N.Y.2d 1 (1997), *forthcoming* 681 N.E.2d 312 (N.Y. 1997). *See* discussion *infra* notes 206-20 and accompanying text.

15. *See generally infra* notes 169-220 and accompanying text.

challenging land use restrictions imposed prior to the time they acquired the property. Under this response, the Court could declare that no property owner, regardless of when the property was acquired, might be deprived of that property without due process where the state relies on its background principles of property and nuisance law. The Court could also conclude that private property might not be taken for public use without just compensation.

Alternatively, the Court can remain silent, allowing states to disassemble protections guaranteed under the Takings Clause. In either event, the Court must not stand by, tacitly encouraging the current assault on the Constitution, leaving property owners, much like Cervantes' tragic hero,[16] tilting at windmills in a futile struggle to preserve their diminishing property rights.

Assume an ordinance is passed declaring that all lots smaller than one quarter-acre in size shall remain unused as open space for the enjoyment of the entire community. The ordinance prescribes a variance procedure which has frequently been utilized, but to no avail. No applications are approved, and the town leaders admit they will never approve any. Should persons acquiring property after the ordinance is passed be able to challenge the ordinance as violating the Fifth Amendment?[17] May the state legislatively alter its background principles that define property interests, depriving owners of valuable property without just compensation?[18] Furthermore, may the government dictate that only some owners can bring a takings claim while others are left without a remedy?

The Fifth Amendment to the United States Constitution provides that no person may be deprived of property without due process, nor may private property be taken for public use without just

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16. *See* MIGUEL DE CERVANTES SAAVEDRA, DON QUIXOTE (1980 ed.). Cervantes masterfully narrates the tale of a gentleman, Don Quixote, who, driven to madness by tales of chivalry, abandons his home in search of adventure. The errant knight would charge with his lance at windmill, convinced that they were in fact giants.

17. Initially the property owners could make a facial challenge alleging that the ordinance, no matter how it was applied, violated the Constitution. The remedy would result in invalidating the ordinance and possibly the payment of just compensation for a temporary taking. This type of challenge is difficult, typically because of short statutes of limitations. Alternatively, after availing themselves of any administrative requirements, the property owners could bring an "as applied" challenge, alleging that the ordinance took their property without payment of just compensation. The payment of just compensation for a temporary or permanent taking, depending on whether the ordinance was invalidated or rescinded, is a possible remedy in this case. *See infra* notes 224-44 and accompanying text. Of course, this assumes that the claim is ripe for adjudication. For a discussion of ripeness requirements in the context of land use cases, see *infra* notes 237-55 and accompanying text.

18. For instance, could a state pass legislation defining away any use of private property or even its very ownership?

compensation.[19] Under decisions of the United States Supreme Court, no property owners should be precluded from challenging the ordinance as depriving them of property in violation of the Fifth Amendment.[20] Unfortunately, this conclusion has not been reached by a number of lower courts.

Some states have barred takings claims under the theory that the owners acquired the land after the ordinance was passed.[21] The courts in these states hold that since the property's use was limited at the time it was purchased, these limitations were part of the title and the interest in the property. Because this "limited use" was all the owners acquired, they were not deprived of any property. Therefore, even if the ordinance was patently unconstitutional, the owners are not entitled to challenge it or receive compensation because they "got what they paid for."[22]

Other states permit the owners to challenge the ordinance or to claim a taking of their property under the rationale that the owners acquired everything owned by their predecessors in interest, including the right to sue for a taking of private property under the Fifth Amendment.[23] Some courts have held that such a suit could be maintained because the ordinance did not alter the fundamental character of property ownership.[24] Hence, the property owners acquired the property on which they had a right to build, notwithstanding the ordinance.[25]

To date, the conflict over whether a pre-encumbered property permits a takings claim is unresolved. The United States Supreme Court has not definitively stated whether a person acquiring property subject to land use restrictions may challenge the restrictions,

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19. *See* U.S. CONST. amend. V.

20. For a more in depth treatment see *Lucas*, *infra* notes 33-54 and accompanying text.

21. These states include Iowa (*Hunziker v. State*, 519 N.W.2d 357 (Iowa 1994)), Massachusetts (*Leonard v. Town of Brimfield*, 666 N.E.2d 1300 (Mass. 1996), and New York (*Anello v. Zoning Board of Appeals*, 678 N.E.2d 870 (N.Y. 1997)) to name a few.

22. An explanation for this theory is that a property owner should not be permitted a windfall, purchasing regulated property at a bargain price and profiting when the regulation is overturned or granted compensation for the taking. *See, e.g.*, Gazza v. New York State Dep't of Envtl. Conservation, 679 N.E.2d 1035 (N.Y. 1997) (concluding that a property owner who acquires property with a known regulation may not bring a takings claim based on the pre-existing regulation). For a detailed discussion of *Gazza*, see *infra* notes 182-99 and accompanying text.

23. Examples of such states include New Jersey (*Moroney v. Mayor Old Tappan*, 633 A.2d 1045 (N.J. Super. A.D. 1993)) and Michigan (*K & K Construction, Inc. v. Department of Natural Resources*, 551 N.W.2d 413 (Mich. App. 1996)).

24. *See, e.g.*, Lopes v. City of Peabody, 629 N.E.2d 1312 (1994) (holding that a landowner could challenge land use regulations that were imposed prior to the landowner's acquisition of the property).

25. *See Lopes*, *infra* notes 64-71 and accompanying text. *But see* Leonard v. Town of Brimfield, 666 N.E.2d 1300 (1996), *infra* notes 72-88 and accompanying text.

although the Court observed that property rights are not altered because property is acquired after a restrictive policy is implemented.[26]

This article addresses the need for a more binding Supreme Court decision precluding states from redefining "property." The article summarizes recent state and federal decisions, discussing the rights of property owners to challenge regulations that deprive them of their property without just compensation, and their misapplication of the Supreme Court holdings in *Lucas v. South Carolina Coastal Council* and *Nollan v. California Coastal Council*. Part II provides background on the issue by discussing the Supreme Court's decisions in *Nollan* and *Lucas*. Part III explores the state of property law after the *Nollan* and *Lucas* decisions. Part IV discusses recent state and federal cases addressing the rights of individuals who acquire property that is subject to restrictions to challenge the restrictions, focusing on the courts' inconsistent application of the *Lucas* and *Nollan* holdings. Part V discusses the Supreme Court's need to address the issue, examining several issues that specifically needs addressing. Finally, Part VI concludes the article by discussing the need for universally understood and accepted decisions, and the need for the Supreme Court to take an active role in addressing the issue.

II. *NOLLAN* AND *LUCAS*—THE SUPREME COURT SPEAKS

A. Nollan v. California Coastal Commission[27]—*The Right to Challenge Existing Land Use Regulations*

Opinions on whether subsequent owners of property can bring takings claims challenging existing land use regulations fall squarely into one of two diametrically opposing camps. One side consists of those who object to such ability as an opportunity for a windfall if the property owners are able to challenge the regulations, while the other side argues that a constitutionally infirm restriction should not be insulated from challenge merely because property has transferred hands.

One of the first opinions from the United States Supreme Court to address this issue was *Nollan v. California Coastal Commission*. In 1982, the California Coastal Commission (Commission) imposed a condition on beachfront property owners to provide access across their property in exchange for the Commission's approval of the owners' rebuilding plans.[28] The property owners brought an action

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26. *See* Nollan v. California Coastal Comm'n, 483 U.S. 825, 833-34 n.2 (1987).
27. 483 U.S. 825 (1987).
28. *See id.* at 828.

against the Commission, charging that this condition violated the Fifth Amendment's Takings Clause.[29] The United States Supreme Court held that the Commission could not condition its grant of permission to rebuild on the Nollans' transfer of a public easement across their property.[30]

In his dissent Justice Brennan argued that the Nollans were aware that the commission's approval was conditioned on preservation of adequate public access to the ocean, and that there existed no reasonable claim to any expectation of excluding members of the public from walking across their beach.[31] However, the Court responded that the Nollans' rights were not altered because the policy was being implemented before they acquired the property.[32]

B. Lucas v. South Carolina Coastal Council[33]—*What Constitutes the Elements of Title in Property*

Related to the question of who can challenge a land use restriction, is the question determination of what rights pass from one property owner to the next. Proponents of a rule precluding an owner of previously regulated property from challenging the restriction have argued that "property" is defined not just by the condition in which the title to property is originally granted but also by years of regulation and land use reforms.[34] Opponents of this overly expansive rule argue that property rights are defined by the state, circumscribed only by the state's background principles of property or nuisance law.[35] Any greater burdens on property owners may constitute a taking for which just compensation is required under the Constitution.[36]

Most recent cases acknowledge the United States Supreme Court's decision in *Lucas v. South Carolina Coastal Council* as the source for this latter rule.[37] David Lucas paid $975,000 for two

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29. *See id.* at 829.

30. *See id.* at 837.

31. *See id.* at 856-57 (Brennan, J., dissenting).

32. *See id.* at 833 n 2.

33. 505 U.S. 1003 (1992).

34. *See* Preseault v. United States, 100 F.3d 1525, 1537 (1996) (rejecting the government's suggestion that property interests are defined not by original conveyances but by evolving enactment and implementation of federal law). *See also* Anello v. Zoning Board of Appeals of Village of Dobbs Ferry, 89 N.Y.2d 535 (1997) (adopting a rule that property owners' titles are encumbered by all existing statutory restrictions).

35. *See, e.g.*, Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) (holding that property rights are defined by state property and nuisance law).

36. *See id.*

37. *See* Preseault v. United States, 100 F.3d at 1538; Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1179 (Fed. Cir. 1994); Healing v. California Coastal Comm'n, 27 Cal. Rptr.

residential lots on the Isle of Palms in Charleston County, South Carolina, with the intention of building single-family homes.[38] Two years later, the South Carolina Legislature enacted the Beachfront Management Act (Act),[39] which had the direct effect of barring Lucas from erecting any permanent habitable structures on his two parcels.[40] A state trial court found Lucas's parcels were rendered "valueless."[41] The trial court found that when Lucas purchased the lots, they were both zoned for single-family residential construction with restrictions on such use by either the State of South Carolina, the County of Charleston, or the Town of the Isle of Palms.[42] The court concluded that Lucas' properties had been taken and ordered that he be paid just compensation of approximately $1.2 million.[43]

A divided South Carolina Supreme Court reversed, finding that the Act was designed to preserve South Carolina's beaches and that any new construction would threaten this public resource.[44] In the dissenting opinion, two justices observed that the government could prohibit noxious uses—public nuisances—without having to pay compensation, but that the Act's primary purpose was not the prevention of a nuisance.[45] The United States Supreme Court reversed the South Carolina Supreme Court's decision, holding:

> Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with. This accords, we think, with our "takings" jurisprudence, which has traditionally been guided by the understandings of our citizens regarding the content of, and the State's power over, the "bundle of rights" that they acquire when they obtain title to property.[46]

The Court continued:

2d 758, 775-76 (1994); Lopes v. City of Peabody, 629 N.E.2d 1312, 1313 (1994); K & K Construction, Inc. v. Department of Natural Resources, 551 N.W.2d 413, 417 (Mich. Ct. App. 1996); Zealy v. City of Waukesha, 534 N.W.2d 917, 921 (Wis. Ct. App.,1995). *See also* Jonathan E. Cohen, *Comment: A Constitutional Safety Valve: The Variance in Zoning and Land-Use Based Environmental Controls*, 22 B. C. ENV. AFF. L. REV 307, 326-27 (1995); Fred P. Bosselman, *Limitations Inherent in the Title to Wetlands at Common Law*, 15 STAN. ENVTL. L.J. 247, 253 (1996).

38. *See* Lucas, 505 U.S. at 1006-07.
39. S. C. CODE ANN. § 48-39-250 - § 48-39-360 (Supp. 1990).
40. *See* Lucas, 505 U.S. at 1007.
41. *Id.*
42. *See id.* at 1009 (citing App. to Pet. for Cert. 36).
43. *See id.* (citing App. to Pet. for Cert.).
44. *See id.* at 1009-10.
45. *See id.* at 1010 (citing *Lucas*, 404 S.E.2d at 906).
46. *Lucas*, 505 U.S. at 1027 (footnote omitted).

> We believe similar treatment must be accorded confiscatory regulations, *i.e.*, regulations that prohibit all economically beneficial use of land: Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership.[47]

In his concurring opinion, Justice Kennedy stated that "[w]here a taking is alleged from regulations which deprive the property of all value, the test must be whether the deprivation is contrary to reasonable, investment-backed expectations."[48] However, the Court responded by observing that the property interest against which the loss of value is to be measured depends on the state's property laws[49] which determines a property owner's reasonable expectations. According to the Court, a state's property laws determine whether and to what degree the particular interest in land, with respect to which the takings claimant alleges a diminution in value, is accorded legal recognition and protection.[50]

Even though Lucas purchased his property before the challenged regulation was imposed, the Court's language indicates that the same decision would result had he purchased his property afterwards.[51] The regulations did little more than "proffer the legislature's declaration that the uses Lucas desir[ed were] inconsistent with the public interest. . . ."[52] Furthermore, while regulations explicitly restricting land uses that were never permitted might not constitute a taking of property, the regulatory limitations precluding Lucas' building on his property were not likely part of South

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47. *Id.* at 1029.

48. *Id.* at 1034 (Kennedy, J., concurring).

> There is an inherent tendency towards circularity in this synthesis, of course; for if the owner's reasonable expectations are shaped by what courts allow as a proper exercise of governmental authority, property tends to become what courts say it is. Some circularity must be tolerated in these matters, however, as it is in other spheres.

Id. (citation omitted).

49. *See id.* at 1016.

50. *See Lucas*, 505 U.S. at 1016-17 n.7.

51. *See id.* at 1026.

52. *Id.* at 1031. The Court responded to Justice Blackmun's dissent:

> In Justice Blackmun's view, even with respect to regulations that deprive an owner of all developmental or economically beneficial land uses, the test for required compensation is whether the legislature has recited a harm-preventing justification for its action . . . . Since such a justification can be formulated in practically every case, this amounts to a test of whether the legislature has a stupid staff. We think the Takings Clause requires courts to do more than insist upon artful harm-preventing characterizations.

Id. at 1025-26 n.12.

Carolina's background principles of property and nuisance.[53] Therefore, the regulations were not inherent in the title to his land.[54]

III. AFTER *NOLLAN* AND *LUCAS*, WHAT IS PROPERTY?

After *Nollan* and *Lucas*, a property owner apparently could challenge land use regulations implemented prior to acquisition of the property. Furthermore, a state could not proscribe uses of property that were not generally precluded under the state's nuisance laws. This has proven untrue, however, as some courts have continued to hold that property owners acquiring their land postregulation have no such right to maintain challenges.[55]

The justifications for these holdings typically fall into one of two categories. The first is the "windfall" or "notice" category, which rationalizes that since the property owner knew of the restriction, perhaps even paying a discount, allowing the owner to challenge the restriction would bestow a windfall. Supporters of this category adhere to the view that "the purchasers got what they paid for."[56] A problem with this conclusion is that too much must be read into the purchase price. For instance, did the purchaser discount the price because fewer uses of the property are possible after the restrictions are imposed, or was the price discounted because the purchaser

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53. The Court cited examples of instances where a property owner might not be entitled to compensation such as where the owner engages in land filling operations that floods another's property or where a company is forced to remove a nuclear generating plant built on a fault line. As the Court observed:

> Such regulatory action may well have the effect of eliminating the land's only economically productive use, but it does not proscribe a productive use that was previously permissible under relevant property and nuisance principles. The use of these properties for what are now expressly prohibited purposes was *always* unlawful, and (subject to other constitutional limitations) it was open to the State at any point to make the implication of those background principles of nuisance and property law explicit.

Lucas, 505 U.S. at 1029-30 (emphasis in original).

54. "It seems unlikely that common-law principles would have prevented the erection of any habitable or productive improvements on petitioner's land; they rarely support prohibition of the 'essential use' of land." *Id.* at 1031 (citing *Curtin v. Benson*, 222 U.S. 78, 86 (1911)).

55. See Hunziker v. State, 519 N.W.2d 357 (Iowa 1994); Anello v. Zoning Board of Appeals, 678 N.E.2d 870 (N.Y. 1997).

56. Typical of these decisions is *Gazza v. New York State Dep't of Envtl. Conservation*, 679 N.E.2d 1035 (N.Y. 1997). In *Gazza*, the New York Court of Appeals held that a property owner was not entitled to challenge a regulation where he paid a steep discount for the property, while fully knowing that the requested property use would not be approved. A discussion of *Gazza* appears at *infra* notes 182-99 and accompanying text.

Perhaps the fuel for this argument comes from the assertion that there is no taking of private property in light of the owner's "reasonable investment-backed expectations." Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978). *See, e.g.*, Leonard v. Town of Brimfield, 666 N.E.2d 1300 (Mass. 1996), discussed in detail, *infra* notes 72-88. *See also* Justice Kennedy's concurring opinion in *Lucas*, discussed *supra* note 48 and accompanying text.

factored in costs of litigation and delays?[57] Presumably, the property owner is not permitted to challenge even a patently unconstitutional restriction if the result would be the realization of a profit.

The second category is based on the theory that a subsequent owner obtained the property circumscribed by all of the existing restrictions. The discussion is usually couched in terms of state background principles of property and nuisance law. Frequently, courts subscribing to this theory will cite *Lucas*, even when the results conflict with those of the Supreme Court majority that rejected redefining property based on regulatory history.[58] Proponents of a narrow interpretation of the Fifth Amendment's Takings Clause have advanced other theories for denying relief to a property owner, few of which have merited more than passing attention by the courts.[59]

No matter what the theory, if a state is able to redefine "property," and in the process take private property without paying just compensation, owners are deprived not only of the value of the property taken, but of a constitutional right no less important than any of the others contained in the Bill of Rights.[60] The Supreme Court in *Lucas* surely could not have intended such a result for the Fifth Amendment.

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57. In *Steinbergh v. City of Cambridge*, 604 N.E.2d 1269 (Mass. 1992), the Supreme Judicial Court of Massachusetts observed that "if, as seems reasonably inferable, their investment expectations were based on the ultimate invalidation of the regulation in a judicial proceeding, the plaintiffs' investment expectations had to reflect the anticipated delay in the litigation process." *Id.* at 1274.

58. *See, e.g.*, Hunziker v. State, 519 N.W.2d 367, 371 (Iowa 1994), discussed *infra* notes 102-120 and accompanying text.

59. One such proposition, advancing beyond Justice Brennan's dissent in *Lucas*, is to expand the background principles to avoid the possibility that property taken might require the payment of just compensation. One of the more extreme examples of this was recently raised in the Amicus Curiae brief in *Gazza v. New York Dep't of Envtl. Conservation*, 679 N.E.2d 1035 (N.Y. 1997), suggesting that there seems to be no reason why a state could not have among its "background principles . . . of property" a common-law rule that property ownership never includes a right to violate the laws enacted by the Legislature. If New York has such a common law "background" principle—that property owners are forbidden to violate state statutes—then New York taxpayers would never have to be saddled with the burdens of the "categorical" rule for "total" takings.

60. As the Court observed in *Lucas*, "a regulation specifically directed to land use no more acquires immunity by plundering landowners generally than does a law specifically directed at religious practice acquire immunity by prohibiting all religions." *Lucas*, 505 U.S. at 1027 n.14.

IV. AFTER *NOLLAN* AND *LUCAS*—THE COURTS RESPOND

A. *Massachusetts*—Lopes v. City of Peabody[61] *and* Leonard v. Town of Brimfield[62]

Shortly after *Lucas*, the Supreme Court accepted a case that presented it with the opportunity to address whether a property owner could challenge preexisting land use regulations.[63] The United States Supreme Court summarily remanded the case, leaving the Massachusetts high court to write the opinion.[64] In 1981, Americo Lopes acquired property to build a small house.[65] Six years before his purchase, the city had passed a zoning provision that precluded any development on the lot.[66] Lopes challenged the provision as an impermissible taking of his property.[67] The appeals court deemed it significant that Lopes knew of the restriction when he purchased the property.[68] The United States Supreme Court granted Lopes' petition for writ of certiorari and remanded the case to the state Court of Appeal in light of its opinion in *Lucas*.[69]

The Massachusetts Supreme Court transferred the case from the lower court, ruling that Lopes had a right to challenge the continued application of the restriction.[70]
The Court observed that:

> A rule that a purchaser of real estate takes subject to all existing zoning provisions without any right to challenge any of them would threaten the free transferability of real estate, ignore the possible effects of changed circumstances, and tend to press owners to bring actions challenging any zoning provision of doubtful validity before selling their property. Moreover, such a rule of law would in time lead to a crazy-quilt pattern of the enforceability of a zoning law intended to have uniform applicability.[71]

Lopes seemingly held that a person could challenge land use regulations imposed prior to acquisition of property. However, in

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61. 629 N.E.2d 1312 (Mass. 1994).
62. 666 N.E.2d 1300 (Mass. 1996).
63. *See* Lopes v. City of Peabody, 600 N.E.2d 171 (Mass. 1992), *cert. granted, vacated, and remanded*, 113 S. Ct. 1574 (1993).
64. *See Lopes*, 629 N.E.2d 1312 (Mass.1994).
65. *See id.* at 1313.
66. *See id.*
67. Lopes sought to remove the regulatory restrictions which prevented him from building on his property but did not seek damages for a taking. *See id.* at 1314 n.5.
68. *See id.* at 1314.
69. *Lopes*, 113 S. Ct. 1574 (1993).
70. *See Lopes*, 629 N.E. 2d at 1314-15.
71. *Id.* at 1315.

Leonard v. Town of Brimfield,[72] the Massachusetts Supreme Court placed such meaning in serious doubt.[73] Mary Leonard owned 16 acres of land in the town of Brimfield.[74] In accordance with the town's zoning by-law, she applied for a special permit to build on her land, which was located in an area designated as a flood plain zone.[75] The board issued her a special permit but limited any construction to only 6 of her 16 acres.[76] Ms. Leonard sued, alleging that enforcement of a flood plain zone restricted development of the property, depriving her of property without compensation in violation of the United States Constitution.[77] Ms. Leonard sought damages for enforcement by the town of the flood plain restriction.[78] After a trial court found for the city, the state supreme court transferred the case on its own motion.[79]

The Massachusetts Supreme Court held that the effect of the contested by-law did not constitute a taking for which Leonard was entitled to compensation.[80] Leonard stated that she intended to subdivide her property into discrete parcels, and because of the special permit restriction, she lost the market value of two of the parcels.[81] The court held her plans to be merely unilateral expectations and not reasonable, investment-backed expectations based on existing conditions.[82] The court's basis was that she could not have expected the right to subdivide the flood plain property.[83] Significantly, the court held that because her property was within a designated flood plain zone, and at the time she purchased the property she had constructive notice of the zoning restrictions, the law prohibited her from challenging those restrictions.[84]

The court recognized that in *Lopes* it held that a person who purchases land subject to a restriction has a right to challenge the continued application of the restriction.[85] However, the court

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72. 666 N.E.2d 1300 (Mass. 1996).

73. In fact, because of ambiguities in the opinion, it is unclear what remains of the *Lopes* opinion.

74. *See Leonard*, 666 N.E.2d at 1301.

75. *See id.* at 1302.

76. *See id.*

77. *See id.*

78. *See id.*

79. *See id.*

80. *See Leonard*, 666 N.E.2d. at 1304.

81. *See id.* at 1303.

82. *See id.*(quoting *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984)).

83. *See id.* at 1303. The court observed, "[f]urthermore, the trial judge found that the parcel at issue is a single sixteen-acre parcel, not individual lots within this parcel as the plaintiff contends, and that the plaintiff had taken no action to subdivide the property." *Id.*

84. *See id.*

85. *See id.* at 1303 n.3 (citation omitted).

differentiated Ms. Leonard's property because it was "subject to the restrictions on building in a flood plain,"[86] and concluded that she could "not complain about the loss of a right she never acquired."[87] According to the court, Leonard never had the right to build in a flood plain.[88] The court was unclear as to whether this was because building in a flood plain is part of the state's background principles of nuisance and property law, or because the town was enforcing a regulatory restriction. If it was because of nuisance law, the opinion might be consistent with *Lucas* and *Lopes*. However, if the development were impermissible because of the town's evolving scheme of regulations, the court in one stroke overruled *Lopes* and ignored *Lucas*. In essence, what the court gave to property owners with one hand in *Lopes*, it may have taken back with the other in *Leonard*.

B. New Jersey—Moroney v. Mayor Old Tappan[89]

The Moroneys purchased an undersized lot which, according to requirements of local zoning ordinances, was too small for a single-family house.[90] The Moroneys applied for a hardship variance which was denied.[91] However, the lower court did conclude that there had been an inverse condemnation when the Moroneys were denied their hardship variance.[92] The Borough appealed, arguing that the lot was useless before the Moroneys purchased it and that they were not entitled to compensation.[93] The New Jersey appeals court disagreed, holding that "a right to relief possessed by the original owner passes to the successor in title . . . [and] [s]uch right is not lost simply because the succeeding owner bought or contracted to buy with knowledge of the lot-size restriction."[94] Integral to this holding is the conclusion that property rights are not redefined each time property is transferred.

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86. *Id.* at 1303.

87. *Id.* (citation omitted). Because the court had determined that the property was not subdivided and that the land use restrictions had only diminished the value of the sixteen-acre parcel as a whole, the court did not have to decide the issue of whether Leonard was barred from claiming a taking based on the preexisting permit restriction. What is perhaps so extraordinary about the opinion is not that it focused so heavily on an issue that the court decided not to address but, rather, that having done so, the court potentially recharacterized its holding in *Lopes*.

88. *See id.*

89. 633 A.2d 1045 (N.J. Super. Ct. App. Div. 1993).

90. *See id.* at 1046-47.

91. *See id.* at 1046.

92. *See id.* at 1046-47.

93. *See id.* at 1047.

94. *Id.* at 1048 (citation omitted).

C. *New York I*—Ward v. Bennett[95]

In *Ward v. Bennett*, the New York Court of Appeals reaffirmed the right of property owners to challenge the denial of a permit to build a single-family residence on property acquired with knowledge of and expressly subject to existing property restrictions.[96]

In 1966, the Wards acquired property, which was subject to an extension of a street through their property.[97] The planned street was to overlap more than 85 percent of the property, but the city never built the road.[98] Twenty years after acquiring the property, the Wards requested a permit to build a single-family house on the property.[99] The Department of Buildings denied the application because of conflict with the mapped street.[100] Reversing the lower proceedings, the New York Court of Appeals held that the Wards were entitled to have their takings claim adjudicated.[101]

D. *Iowa*—Hunziker v. State[102]

In 1990, Erbin Hunziker and a group of land developers sold a lot in a 59-acre tract of subdivided farmland to Dr. Jon Fleming who planned to build a home on the lot.[103] Before construction on the home could begin, the state archaeologist learned that the lot contained a Native American burial mound.[104] Pursuant to statutes enacted by the Iowa Legislature in 1976 and 1978,[105] the state archaeologist prohibited the disturbance of the remains,[106] and required a buffer zone to be placed around the burial mound.[107] Because of the size of the restricted portion of the property, the city refused to issue a building permit for the lot.[108]

Because Dr. Fleming was unable to build a home on the lot, the developers refunded his purchase price in return for his interest in the lot, including the right to sue for a taking.[109] Hunziker and the other owners brought suit in state court, alleging that the state's

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95. 592 N.E.2d 787 (N.Y. 1992).
96. *See id.* at 788.
97. *See id.*
98. *See id.*
99. *See id.*
100. *See id.*
101. *See id.*
102. 519 N.W.2d 367 (Iowa 1994).
103. *See id.* at 368.
104. *See id.*
105. Iowa Code §§.7, 305A.9 (renumbered as Iowa Code §§263B.7, 263B.9 (1993)).
106. *See Hunziker*, 519 N.W.2d at 368.
107. *See id.* at 368, 370.
108. *See id.* at 368-369.
109. *See id.* at 369.

action was a regulatory taking of private property without just compensation.[110] The trial court granted summary judgment in favor of the state.[111] The plaintiffs appealed to the Iowa Supreme Court, which affirmed the trial court on a vote of four to one.[112]

Interestingly, both the majority and the dissent relied upon the United State Supreme Court's decision in *Lucas* as authority for their respective positions.[113] The majority denied petitioners compensation because they had acquired the land after the enactment of the statutes, which the court deemed part of the state's property law prohibiting the development of any land in the state containing significant human remains.[114] Under the court's reasoning, because both the statutes and burial mound existed before petitioners purchased the lot, the right to develop the lot was not one of their property interests.[115] The dissent, also relying upon *Lucas*, reasoned that a regulatory taking occurred when the government applied the statutes to the lot in a manner that precluded all economically viable use.[116]

The United States Supreme Court denied Hunziker's petition for writ of certiorari.[117] As a result, the Court let the state opinion stand which seemingly applied *Lucas* while precluding a property owner from receiving just compensation when all economically viable use of property was extinguished by the mere passage of legislation.[118] The law, passed in the mid-1970's, essentially made all land containing "significant human remains undevelopable."[119] Under the Iowa Court's reasoning, it would be unlikely that anyone had obtained property prior to the original interment of the remains some thousands of years earlier, so it would be impossible to have ever acquired a right to build on the property.[120] Thus, Iowa succeeded

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110. *See id.*

111. *See id.*

112. *See id.* at 371.

113. As support for its holding that there had been no taking, the court stated that "implicit in the [*Lucas*] 'bundle of rights' analysis is that the *right* to use the land in the way contemplated is what controls. Here, when the plaintiffs acquired title, there was no right to disinter the human remains and build in the area where the remains were located." *Hunziker*, 519 N.W.2d at 371 (emphasis in the original). However, the dissent, relying on broad language in the *Lucas* opinion, argued that "[t]he law established by Lucas actually supports the claim of plaintiffs in the case at bar." *Id.* at 372 (Snell, J., dissenting).

114. *See id.* at 371.

115. *See id.*

116. *See id.* at 373.

117. *See* Hunziker v. State, 514 U.S. 1003 (1995).

118. *See* Hunziker v. State, 519 N.W.2d 367 (Iowa 1994).

119. *See supra* notes 105-08 and accompanying text.

120. *See Hunziker*, 519 N.W.2d at 371. The enormity of such an opinion can never be known. At least, it will be so until all of the "significant human remains" are located, a task

where the South Carolina legislature had previously failed by reshaping the state's law of property to the detriment of all property owners.

E. *Wisconsin*—Zealy v. City of Waukesha[121]

Zealy owned 10.4 acres of land that had been annexed by the City of Waukesha in 1967.[122] Originally part of a 250-acre parcel zoned for agricultural use, after annexation, the land was rezoned to permit residential use.[123] In 1982, contemplating future residential development on the 10.4 acre parcel, Zealy granted an easement to the city for sanitary and storm sewers.[124] Three years later, the City rezoned 8.2 of the 10.4 acres, creating a conservancy district in which no residential or business development was permitted.[125] However, the new zoning did allow agricultural use.[126]

Zealy brought an inverse condemnation action against the city, claiming that its rezoning of his land constituted a regulatory taking without compensation.[127] A principal focus of the litigation in the lower courts was whether the trial court should consider Zealy's parcel as a whole in determining whether a taking had occurred.[128] The Wisconsin Supreme Court held, as part of its conclusion that there had been no taking of Zealy's property without just compensation, that the land could "still be used for its historical use. . . ."[129] The court relied upon its decision in *Just v. Marinette County*,[130] a 1972 decision preceding both *Lucas* and *Nollan*, holding that:

> [D]epreciation of value is not based on the use of the land in its natural state but on what the land would be worth if it could be filled and used for the location of a dwelling. While loss of value is to be considered in determining whether a restriction is a constructive taking, value based upon changing the character of the land at the expense of harm to public rights is not an essential factor or controlling.[131]

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that could potentially affect every parcel in the state, given the migratory practices of early American inhabitants.

121. 548 N.W.2d 528 (Wis. 1996).

122. *See id.* at 529.

123. *See id.* at 529-30.

124. *See id* at 530.

125. *See id.* The remaining 2.1 acres were zoned for residential (1.57 acres) and business (.57) use. *See id.*

126. *See id.*

127. *See id.*

128. *See id.*

129. *Id.* at 534.

130. 201 N.W.2d 761 (Wis. 1972).

131. *Zealy*, 548 N.W.2d at 534 (quoting *Just*, 201 N.W.2d at 771).

The court's reliance upon *Just* raises the question as to whether there could ever be a regulatory or categorical taking successfully prosecuted in Wisconsin where a property owner was denied the ability to make any use of property, as that use would necessarily change the character of the land. The court did not address the fact that no use contemplated by Zealy, whether residential or commercial, even remotely constituted a nuisance, nor would such an argument seem plausible after *Lucas*.[132]

The effect of the court's decision is that permissible uses of property are not defined in terms of a state's background principles of property and nuisance. Rather, property is defined by an ephemeral composite of land use restrictions that fix or limit uses of property. The Court demonstrated the ease with which it could apply this process, holding that regulations prohibiting Zealy from making reasonable use of his property did not constitute a taking merely because the present permissible uses matched uses permitted at some historical point in time.[133]

Recalling whether a state could pass legislation defining away any use of private property or even its very ownership, the answer in this case appears to be "yes."[134] The rationale might be that originally—hundreds or even thousands of years ago—the land was put to no use, developed in no manner whatsoever. The land use regulations restricting all use would be consistent with the "historic use." In fact, the only thing the state would have succeeded in defining away would be protections guaranteed under the Takings Clause.

F. *Michigan*—K & K Construction, Inc. v. Department of Natural Resources[135]

J.F.K. Company owned a number of parcels in Waterford Township in Oakland County.[136] Joseph and Elaine Kosik, parents of the five children comprising J.F.K. Co., acquired the property in 1976.[137] J.F.K. wished to build on one of the parcels covering 55 acres of the

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132. As the Court in *Lucas* observed, "[t]he fact that a particular use has long been engaged in by similarly situated owners ordinarily imports a lack of any common-law prohibition (though changed circumstances or new knowledge may make what was previously permissible no longer so (sic) [citation omitted]. So also does the fact that other landowners, similarly situated, are permitted to continue the use denied to the claimant." *Lucas*, 505 U.S. at 1031.

133. *See Zealy*, 548 N.W.2d at 534.

134. *See supra* note 18.

135. 551 N.W.2d 413 (Mich.App. 1996). At the time this article was written, the Michigan Supreme Court had granted review of but not yet decided the case on appeal.

136. *See id.* at 415.

137. *See id.*

property.[138] In 1988 the Department of Natural Resources (DNR) denied J.F.K.'s application for a development permit, based on a determination that approximately 28 acres of that parcel was protected wetlands.[139] J.F.K. sued on the grounds that the area was not wetlands and the denial of the permit constituted a taking of its property.[140]

In 1990, J.F.K. submitted a second application to fill a little more than three acres of the wetland.[141] The DNR also denied this permit.[142] In 1992, the Michigan Court of Claims determined that a taking of J.F.K.'s property occurred because the denial of the permit applications rendered the property worthless.[143] The DNR appealed, claiming that it denied the permit based on a fundamental principle of Michigan property law, the preservation of wetlands.[144] The Court of Appeal, citing *Lucas*, noted that "the state must identify *background principles of nuisance and property law* that prohibit the uses the landowner intends in the circumstances in which the property is found."[145] The court also observed that neither building a restaurant on land, nor requesting to fill in wetlands constitutes a nuisance that the government may regulate against.[146] The court concluded that the general principles of public interests found in the state constitution do not form a sufficient basis to take a person's land without just compensation on principles of nuisance or property law.[147]

The DNR also appealed on the grounds that because J.F.K. acquired title after the enactment of the regulation, it could not challenge the regulation.[148] The court of appeal disagreed.[149] Because the court previously concluded that the regulation was not a part of the title itself based on principles of property and nuisance, "[t]he passage of the [regulation] cannot be understood as depriving J.F.K. Company of just compensation merely because the WPA was in effect when the quit claim-deed was executed. . . . [T]he timing of the regulation and the transfer of the land do not dictate that plaintiffs

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138. *See id.*

139. *See id.*

140. "Plaintiffs initially sought a declaratory ruling that the area is not wetlands and also sought injunctive relief against defendant's enforcement of the [Wetland Protection Act] and damages under the WPA." *Id.* at 415-16.

141. *See id.*

142. *See id.* at 416.

143. *See id.*

144. *See id.* at 417.

145. *Id.* (citing *Lucas*, 505 U.S. at 1030-31) (emphasis added).

146. *See id.*

147. *See id.*

148. *See id.* at 417.

149. *See id.* (citing *Nollan*, 483 U.S. at 833 n.2).

are not entitled to just compensation."[150] Thus, just as a New Jersey court had held in *Moroney*, the Michigan court concluded that property rights are not redefined each time property is transferred.[151]

G. *Federal Circuit*—Preseault v. United States[152]

In a decision addressing the questions of what is included in title to property and who could maintain a suit for a taking, the Court of Federal Claims dismissed arguments by the government which would have profoundly impacted future takings law.[153] The Preseaults' home was located on a tract of land near the shore of Lake Champlain in Burlington, Vermont in which they had a fee simple interest.[154] A railroad right-of-way ran over three parcels within this tract.[155] Originally acquired by the Rutland-Canadian Railroad Company in 1899, over time, the right-of-way passed through several successor railroad companies.[156]

The controversy arose because the federal Rails-to-Trails Act[157] provided for the conversion of unused railroad rights-of-way for use as public recreational trails.[158] The Preseaults challenged the conversion of the right-of-way through their tract, claiming that because the railroad only had an easement, they held the reversionary interest upon abandonment of the easement.[159] The United States argued that the original conveyances in 1899 did not define the Presault's property interests in the tract, rather, "the evolving enactment and implementation of federal railroad law between 1899 and the date . . . the Presaults acquired the parcels" defined their interests.[160]

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150. *Id.* at 417-18.

151. *See id.* at 418.

152. 100 F.3d 1525 (Fed. Cir. 1996).

153. *See id.* at 1533. The Court observed that

> [E]nactment of broad general legislation authorizing a federal agency to engage in future regulatory activity is not the type of government action that alone supports a taking claim. If Congress intended the 1920 Act to have such an effect, contrary to all established assumptions about general legislation, and with the result of directly obligating the Government to a potentially enormous liability of unknown dimensions for takings throughout the United States, there surely would have been some indication of that intent in the legislative history, if not in the legislation itself. The Government points to none, because none exists.

Id. at 1538. (citations omitted)

154. *See id.* at 1531.

155. *See id.*

156. *See id.*

157. Pub.L.No. 98-11, 97 Stat. 48 (codified as amended at 16 U.S.C. §1247 (1994)). Congress enacted the Rails-to-Trails Act on March 28, 1983.

158. The purpose of the Act was to create a national network of public recreational biking and hiking trails. *See Presault*, 100 F.3d at 1529.

159. *See id.* at 1536.

160. *Id.* at 1537.

The court categorically rejected the thesis that general legislation enacted after the creation of the property interests "somehow redefined state-created property rights and destroyed them without entitlement to compensation."[161] Criticizing the government's reliance upon a few inapt extractions from *Lucas*, the court emphasized that the *Lucas* court relied on *state-defined nuisance rules*.[162]

> Nothing in *Lucas* suggests that the background principles of a state's property law include the sweep of a century of federal regulatory legislation, and indeed much of what the Supreme Court said then, as well as in *Preseault II*, about property rights indicates to the contrary. Nor is there any suggestion in this case that the Preseaults' use of their property could be considered in any way to be a public nuisance under traditional nuisance concepts, justifying the intervention of state authorities.[163]

The Court also held that the Preseaults could bring their takings claim despite having acquired the property after the implementation of federal regulations.[164] The Court observed that, until there was a physical occupation, the only claim that could have been brought in 1920—the time the federal scheme of regulation was implemented—was a claim based upon a regulatory taking.[165] However, the concept of regulatory takings was not born until two years later when Justice Holmes uttered his famous statement about regulation that "goes too far."[166] Furthermore, the court observed that "any property owner who was prescient enough to allege a regulatory taking following the enactment of the Transportation Act of 1920, in addition to having some doctrinal explaining to do, presumably would have been met by an equally prescient Government with the defenses of absence of ripeness and failure to exhaust administrative remedies."[167] The court of appeals concluded that the timing of land use regulations and ownership are simply irrelevant to the question of whether a property owner can challenge the regulations as effecting a taking of property without just compensation.[168]

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161. *Id.* at 1530.
162. *See id.* at 1538
163. *Id.* at 1539.
164. *See id.* at 1537.
165. *See id.* at 1537-38.
166. *Id.* at 1538 (citing Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1992)).
167. *Id.*
168. *See id.* at 1540. "Under the governing law of the State, the Preseaults, successors in title to those who owned the property when the easements were created, owned the same title and interest as they, and are entitled to the same protections the law grants." *Id.*

H. New York Court of Appeals – 4, United States Supreme Court - 0

On February 18, 1997, the New York Court of Appeals decided four cases. One involved the calculation of the value of condemned property;[169] two involved regulations that restricted uses of property;[170] and the other involved a physical invasion.[171] These cases involved distinct areas of land use law—condemnation, regulatory taking, and physical taking. However, the results in each case were the same: the property owners were charged with notice of existing restrictions and therefore could not challenge them as applied to their respective property. Through these four cases, the New York Court of Appeals formulated a rule which it appears intent on applying to all land use cases.[172]

1. Anello v. Zoning Board of Appeals[173]

In 1989, the Village of Dobbs Ferry enacted a steep-slope ordinance which precluded building on lots with a buildable area of less than 5,000 square feet.[174] Ms. Anello purchased her property in 1991, and under the ordinance, the buildable portion of her lot was calculated as 4,200 square feet.[175] She sought a variance which the Zoning Board of Appeals denied.[176] The appellate court also denied her appeals, concluding that the Board's denial of the variance was not arbitrary or capricious.[177]

In 1997, the New York Court of Appeals affirmed the lower court's decision denying Ms. Anello any remedy, concluding that she never had the right to make such a use of her property.[178] The court observed:

> [S]he never acquired an unfettered right to build on the property free from the steep-slope ordinance. [She] purchased the property in 1991, two years *after* the steep-slope ordinance was enacted. This statutory restriction thus encumbered petitioner's title from the

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169. *See* Basile v. Town of Southhampton, 678 N.E.2d 489 (N.Y. 1997).

170. *See* Anello v. Zoning Board of Appeals, 678 N.E.2d 870 (N.Y. 1997); Gazza v. New York State Dep't of Envtl. Conservation, 679 N.E.2d 1035 (N.Y. 1997).

171. *See* Soon Duck Kim v. City of New York, 681 N.E.2d 312 (N.Y. 1997).

172. For the foreseeable future, New York is free to apply its new rule. For on October 6, 1997, the United States Supreme Court declined to review these cases. *See infra* notes 182, 200, and 206.

173. 678 N.E.2d 870 (N.Y. 1997).

174. *See id.* at 870.

175. *See id.*

176. *See id.*

177. *See id.* at 871.

178. *See id.* at 872.

> outset of her ownership and its enforcement does not constitute a governmental taking of any property interest owned by her.[179]

Responding to the dissent's assertion that this rule would impede the alienability of property, the court stated that the rule should encourage prior owners to assert any compensatory takings claim they might have.[180] This was precisely one of the concerns expressed by the Massachusetts court in *Lopes*.[181] Thus, as a result of the decision in *Anello*, transferring a parcel of property will transform a compensable taking into one that is noncompensable.

2. Gazza v. New York State Department of Environmental Conservation[182]

In 1989, Joseph F. Gazza purchased a parcel of land in Suffolk County, New York, for $100,000.[183] At the time of the purchase the respondent, New York State Department of Environmental Conservation (DEC), had previously inventoried approximately 65 percent of the 43,500-square-foot parcel as tidal wetlands.[184] A few months prior to purchasing the property, Gazza submitted an application to the DEC to construct a single-family home on the parcel.[185] The DEC denied the application but permitted Gazza to build a dock, catwalk, and small parking lot on the condition that he obtain permits from the town.[186]

Nevertheless, Gazza purchased the property and appealed the decision denying him a permit to build a home.[187] The lower court denied relief because there was still some use for the property and because he purchased the property with notice of the restrictions.[188] The intermediate appellate court affirmed the trial court's decision, observing that the key issue was Gazza's knowledge of the wetlands regulation burdening the property when he bought it.[189] The court

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179. *Id.* at 871.

180. *See id.*

181. *See supra* notes 64-71 and accompanying text. The problem of alienability is discussed *infra* notes 224-36 and accompanying text.

182. 679 N.E.2d 1035 (N.Y. 1997), *cert. denied*, 118 S. Ct. 58 (1997).

183. *See id.* at 1036.

184. *See id.*

185. *See id.*

186. *See id.*

187. *See id.*

188. *See* Gazza v. New York State Dep't of Envtl. Conservation, 605 N.Y.S.2d 642, 645 (N.Y. Sup. Ct. 1993) (finding that because Gazza knew of the limitations on the parcel, he could not have had a reasonable investment-backed expectation that he would be able to build a house there).

189. *See* Gazza v. New York Dep't of Envtl. Conservation, 634 N.Y.S. 2d 740, 744 (N.Y. App. Div. 1995).

concluded that a property owner was not entitled to challenge a regulation where he paid a discount for the property and knew that the requested property use would not be approved.[190]

The New York Court of Appeals affirmed the lower court's decision.[191] The court applied for the second time a new rule of law which directly contradicted not only *Lucas*, but years of takings jurisprudence. The court began by stating, "[o]ur courts have long recognized that a property interest must exist before it may be 'taken' . . . [similarly, a taking claim may not] be based upon property rights that have already been taken away from a landowner in favor of the public."[192] The court then concluded that a known regulation becomes part of a property's title as a pre-existing rule of state law;[193] therefore, Gazza never had a right to build on his property and could not base his takings claim on such an interest.[194]

The New York Court of Appeals' rule in *Gazza* prohibiting property owners from bringing as-applied challenges to preexisting regulations is directly in conflict with *Lucas*.[195] The conclusion to be drawn from *Gazza* and the New York rule is that the protections of the Fifth Amendment for regulatory takings do not apply once affected property is transferred.[196] Given such a principal of law, there would be very little to prevent the government from regulating property in a manner that could constitute a potential regulatory taking. Combined with significant ripeness hurdles which must be overcome by property owners seeking to challenge the regulations as applied, it would be inevitable that much of the property would be transferred before a takings challenge could be brought.[197]

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190. *See id.* at 746.

191. *See* Gazza v. New York State Dept of Envtl. Conservation, 679 N.E.2d 1035, 1043 (N.Y. 1997).

192. *Id.* at 1039.

193. *See id.*

194. *See id.*

195. The New York court quoted the *Lucas* court for the principle that a property owner must expect the uses of property to be restricted. However, the court's reference to *Lucas* stopped short, omitting that portion of the *Lucas* opinion where the Supreme Court continued

> In the case of land, however, we think the notion pressed by the Council that title is somehow held subject to the "implied limitation" that the State may subsequently eliminate all economically valuable use is inconsistent with the historical compact recorded in the Takings Clause that has become part of our constitutional culture.

Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1028 (1992).

196. In an interesting note, the court of appeals observed, "[t]he entirely separate inquiry of whether an existing taking claim may be donated, sold, inherited or otherwise assigned is not before this Court." *Gazza*, 679 N.E.2d at 1039 n.4. For a discussion of whether the new rule would apply to noncommercial transactions, see *infra* notes 259-60 and accompanying text.

197. The problems of ripeness in the context of challenges to regulatory takings are discussed *infra* notes 244-49 and accompanying text.

The possibility of such an outcome should not be dismissed. In a concurring opinion, Justice Wesley disagreed that Gazza should not be able to bring a claim merely because he purchased the property after the restriction took effect.[198] He believed that the results of the court of appeals' new rule could have a devastating effect on property values.[199]

3. Basile v. Town of Southampton[200]

In 1990, the Town of Southampton acquired ownership by condemnation of a 12-acre parcel previously owned by Basile.[201] The land was classified as 95 percent wetlands and subject to a covenant that the town planning board must approve any building.[202] A dispute over valuation ensued.

The court of appeals, applying its new rule redefining property, held that Basile could not benefit from a general rule that property would be appraised based on its unregulated value.[203] The court stated that "[w]hatever taking claim the prior landowner may have had against the environmental regulation of the subject parcel, any property interest that might serve as the foundation for such a claim was not owned by claimant here who took title after the redefinition of the relevant property interests."[204] The court also acknowledged that private covenants already encumbered the property, although

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198. *See Gazza*, 679 N.E.2d at 1043. (Wesley, J., concurring). Justice Wesley believed that the property still had value so there was not a taking. However, he disagreed with the majority which applied its broad rule precluding owners from challenging regulations as applied. *See id.*

199. [A] subsequent purchaser should also be able to challenge an otherwise valid regulation if it results in a taking without compensation. There are many reasons why a prior owner might not have pursued a taking claim. For example, a prior owner may have lacked the financial resources to develop the property or to commence an action on a taking claim. Under the reasoning of the majority, the prior owner would nonetheless have had to keep abreast of regulatory enactments and, if an enactment appeared to deprive the property of its economic value, to challenge the statute. Otherwise, the property may have been rendered worthless without the government paying any compensation for the property. By conveying the property to another party who may be willing and able to develop it or to seek compensation for the taking of its value, the prior owner has instead, under the majority's holding, ensured the destruction of the property's economic value.

Id. (Wesley, J., concurring).

200. 678 N.E.2d 489 (N.Y. 1997), *cert. denied*, 118 S. Ct. 264 (1997).

201. *See id.* at 489.

202. *See id.* at 490.

203. *See id.* at 489.

204. *Id.* at 490-91.

that fact played little, if any, part in the court's application of its rule.[205]

4. Soon Duck Kim v. City of New York[206]

Perhaps the most extraordinary application of the New York Court of Appeals' new rule came in *Soon Duck Kim v. City of New York* when the court used the rule to justify a permanent physical invasion of private property without compensation.[207] In 1978, the city raised the legal grade of a section of street in Queens from 9.1 to 13.5 feet and filed a map reflecting the regrading.[208] Ten years later, the Kims purchased property abutting the street, and two years after that the city again regraded the street, raising it nearly 4.5 feet.[209] The regrading left the street more than 4 feet above the adjoining property.[210] The city notified the property owners that they had to regrade their property.[211] However, when consent was not received, the City raised the property by placing 2,390 square feet of side fill on the property.[212]

The property owners challenged the permanent physical occupation. Seemingly eager to expand the application of its new rule beyond regulatory takings to physical occupations as well, the court of appeals began with an inquiry as to the rights and obligations contained in the plaintiff's title.[213] The court went so far as to declare that it did not need to address whether this was a regulatory or physical taking.[214]

The court stressed that the Kims were under an obligation to "fill any sunken lot."[215] The court began by stating that New York property owners must provide lateral support for roadways,[216] and then extended this obligation to include newly raised roads.[217] The

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205. *See id.* at 491. Justice Wesley, concurring, disagreed with the Court's new rule preventing Basile from "claiming the value of her property without the wetlands regulations solely because she took title after the enactment of those regulations." *Id.* However, he noted that she nonetheless took title subject to the covenants filed by the previous owner which "substantially restrict the value and use of the property." *Id.* The covenants therefore made the rule redundant.

206. 90 N.Y.2d 1 (1997), *cert. denied*, 118 S. Ct. 50 (1997).

207. *See id.*

208. *See id.* at 4.

209. *See id.*

210. *See id.*

211. *See id.*

212. *See id.*

213. *See id.*

214. *See id.*

215. *Id.*

216. *See id.*

217. *See id.*

court did not recognize this as an expansion of rules relating to property adjoining roadways and indicated that such an obligation was simply an inherent part of property ownership in New York City.[218]

However, in his dissent, Justice Smith correctly observed that the majority's decision was inconsistent with the United States Supreme Court decision in *Loretto v. Teleprompter Manhattan CATV*.[219] Justice Smith also observed that the court turned its back on the requirement in *Lucas* that the obligations could be valid only if the limitation on the property existed in background principles of state law.[220] Applying this decision, the state could construct a new elevated highway through a residential subdivision and then take, without compensation, every property required to support the superstructure.

V. THE MISSING OPINION

These cases raise an obvious question: when will the United States Supreme Court address whether property owners can challenge land use restrictions imposed prior to the time they acquired the property? Each of the earlier cases cited above offered the Court an opportunity to address this question.[221] The Court's remand in *Lopes* seems scant authority for a question with extraordinary implications for all property owners.

While any opinion would seem better than none, the field of regulatory takings cries out for an opinion which addresses the

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218. *See id.* at 11. In his dissent; however, Justice Smith disagreed that a rule requiring the Kims to provide lateral support to a newly raised road could ever be found in New York's common law. *See id.* at 17 (Smith, J., dissenting).

219. *See id.* at 17 (Smith J., dissenting) (citing *Loretto v. Teleprompter Manhatten CATV*, 458 U.S. 419 (1982)). In *Loretto*, the United States Supreme Court stated:

> [W]e have long considered a physical intrusion by government to be a property restriction of an unusually serious character for purposes of the Takings Clause. Our cases further establish that when the physical intrusion reaches the extreme form of a permanent physical occupation, a taking has occurred . . . [and] [w]hen faced with a constitutional challenge to a permanent physical occupation of real property, this Court has invariably found a taking.

Loretto, 458 U.S. at 427.

220. *See Soon Duck Kim*, 90 N.Y.2d at 19 (citing *Lucas*, 505 U.S. at 1031).

221. In two of these cases, the United States Supreme Court already passed on the opportunity. The Court remanded *Lopes* without any opinion, see *Lopes*, 113 S.C. 1574 (1993), and denied the petition for writ of certiorari in *Hunziker*, see 115 S. Ct. 1313 (1995); *see also* Moroney v. Mayor of Old Tappan, 633 A.2d 1045 (1993); Ward v. Bennett, 592 N.E.2d 787, 788 (1992). Until recently, only *K & K Const., Inc. v. Department of Natural Resources*, 551 N.W.2d 413 (Mich.Ct.App. 1996), and *Presault v. United States*, 100 F.3d 1525 (Fed. Cir. 1996), appeared even remote candidates for addressing the questions. However, on February 18, 1997, the New York Court of Appeals presented the United States Supreme Court a golden opportunity when it created a *per se* rule precluding property owners from challenging regulatory and physical takings of their property without compensation.

following issues: (1)the implications of restricting challenges to existing owners of property on market efficiency and alienability; (2) the difficulty of bringing regulatory takings claims because of ripeness requirements; (3) the implication of a rule which would, in essence, legitimize unconstitutional land use regulations if not brought by the pre-regulated owner; and (4) the legitimacy of a rule that discriminates between owners who owned property prior to the imposition of land use restrictions and those who obtained property after the restrictions are enacted.

A. Market Efficiency, Alienability of Property, and Windfalls

In *Lopes v. City of Peabody*,[222] the Massachusetts Supreme Court observed that the free transferability of real estate was threatened by refusing to permit a property owner to challenge a zoning enactment implemented prior to the owner's acquisition of the land.[223] Although the Court did not explain how such a rule would burden the alienability of property, possible reasons readily come to mind.

As a basic principle, relatively unrestricted alienability generally enhances efficiency of land use.[224] Placing the property in the hands of those willing and capable of maximizing its utility enhances the intrinsic value of property.[225] By implication, the general wealth of the community is improved. However, when regulations burden property by decreasing possible uses of the property, the property becomes less desirable because the owner is no longer capable of maximizing its utility.[226] All other things being equal, a rational participant in the market will favor property less intensively regulated in order to maximize return on investment.[227] Professor Eagle

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222. 629 N.E.2d 1312 (Mass. 1994).

223. *See id.* at 1315.

224. *See* Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1376 (1993).

225. *See id.*

226. An entirely different result is reached where property owners willingly impose limitations upon their own use of land, such as in the case of covenants. Presumably, there is an equal or greater gain in the value of the property, else the owners would not have entered into the restrictions. *See* Richard A. Epstein, *The Seven Deadly Sins of Takings Law: The Dissents in Lucus v. South Carolina Coastal Council*, Loy L.A. L. Rev. 955, 963-64 (1993).

227. *See* STEVEN J. EAGLE, REGULATORY TAKINGS § 8-2(c), at 312 (1996). Of course, not every prospective purchaser follows this market rule. *See, e.g.*, Florida Rock Indus., Inc. v. United States, 18 F.3d 1560 (Fed. Cir. 1994) [hereinafter *Florida Rock IV*].

> A speculative market may exist in land that is regulated as well as in land that is not, and the precise content of regulations at any given time may not be particularly important to those active in the market. As this court observed in *Florida Rock II*, 791 F.2d 893 at 902-03, yesterday's Everglades swamp to be drained as a mosquito haven is today's wetland to be preserved for wildlife and aquifer recharge; who knows what tomorrow's view of public policy will bring, or how the market will respond to it.

Florida Rock IV, 18 F.3d at 1566.

notes that free alienability encourages a property owner to guard the property's value.[228] However, as he correctly observes, property owners may not appreciate the effects of the regulations or be in a position to challenge them.[229]

Given the prospect of intensively regulated, and therefore less desirable, property in the marketplace, the owner has two options. The owner can either challenge the regulation or reduce the price of the property. However, if the owner is not in a position to be able to develop the property, either because such plans would be premature or because the owner does not have the resources to develop the property, challenging the regulation could prove difficult if not impossible.[230] Even if the property owner planned to develop the property or challenge the regulation to preserve the property's value, the costs of such a challenge can be substantial. As a result, cost of ownership may increase to the point where recovering costs of the property upon resale would be difficult, if not impossible.[231] The property owner might consider holding onto the property while another property owner challenged the regulation's constitutionality, but with no assurances that such a challenge would ever be mounted or even successful, the owner would be left holding regulated property with no sure prospects for relief. Alternatively, if the owner reduced the price of the property, the economic costs of the regulation would be internalized.[232] By assuming the economic costs, the property owner suffers a loss which is almost certainly not compensable.[233]

Over time, as new regulations are applied to property, a rule limiting the rights of a property owner to challenge existing restrictions would impose increasingly onerous burdens on owners. If the owners are unable or decline to challenge any of the regulations, some owners may market properties subject to extraordinary restrictions. Under a rule precluding subsequent acquirers of property

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228. *See* EAGLE, *supra* note 227.

229. "The owner who is not actively planning a conversion to a newly restricted use probably would never learn of it, since he is apt to have only constructive notice, or at best, a booklet outlining changes in county zoning in dense legal prose." *Id.*

230. *See infra* Part V.B.

231. "Even assuming actual knowledge, the time for appeal is apt to be short, the difficulty and expense of litigation substantial, and the knowledge of how the change might affect the rights of a prospective buyer almost non-existent." EAGLE, *supra* note 227.

232. This reduction in price could have an effect on the entire community, a cost not typically considered when regulations are implemented. For instance, reducing valuation of property can reduce property tax revenues.

233. In this instance, the owner has suffered a loss as part of the larger property interest. Often referred to as part of a stick in the bundle, courts are loathe to find the owner entitled to compensation. Such was the case in *Zealy v. City of Waukesha*, 548 N.W.2d 528 (1996). *See supra* note 121-34 and accompanying text.

from challenging existing regulations, the rules would become virtually unchallengeable and a permanent part of the title. Depending on which regulations were successfully challenged, some properties would be less severely regulated than others.[234] The seemingly random application of land use restrictions upon otherwise similarly situated properties would have a dramatic effect on the property marketplace. Property relatively free from regulation might command a far greater price than heavily regulated property, even if intrinsic qualities of the property would make it more valuable.[235] On the other hand, heavily regulated property would lose its desirability until it eventually became valueless.

The New York Court of Appeals went to great lengths to point out that a rule precluding subsequent owners from challenging previously enacted land use restrictions would prevent landowners from achieving a windfall at taxpayers' expense.[236] However, in many instances, such a rule would achieve precisely the opposite result.

Suppose, for example, that two adjoining properties, *Eastacre* and *Westacre,* are regulated in precisely the same fashion. The owner of *Eastacre* sells the property at a steep discount, reflecting the regulated status of the property and the new owner's inability to challenge the land use limitations. The owner of *Westacre* then challenges the regulations as applied to his property. The court rules that the regulations are not only unconstitutional as applied to *Westacre* but also as applied to any property. The court strikes the regulations and they no longer apply to either *Eastacre* or *Westacre.* The new owner of *Eastacre* will have achieved an even greater windfall than might have been possible without the rule. Without the rule, the buyer and seller of *Eastacre,* appreciating that either could challenge the regulation, would have negotiated a price reflecting the ability of the new owner to challenge the regulation and potentially enhance the value of the property. In essence, the regulatory discount would be discounted by the probability of success less the costs of the challenge. A rule precluding the new owner from challenging the regulations

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234. A question which has never been addressed is whether a regulation which is held to be unconstitutional would be applied to an acquirer of property after imposition of the regulation but prior to its challenge.

235. For example, a site with a spectacular view would command a greater price than one overlooking a landfill. Property with convenient access is probably more valuable than property far from principal roadways. However, neither property in these examples is be more valuable if all or most development were precluded.

236. *See* Gazza v. New York State Dept. of Envtl. Conservation, 679 N.E.2d 1035, 1040 (N.Y. 1997).

dramatically depresses the value of the land and maximizes the seller's loss.

B. Land Use Regulations and Ripeness

A rule limiting challenges to a restrictive land use regulation, at the time the regulation becomes effective, imposes undue hardships on property owners by forcing them to file immediate legal challenges or risk the loss of a valuable interest in their property. A property owner may challenge a regulation either *facially* or *as applied*.[237] A facial challenge relates to the mere enactment of the statute. The property owner may facially challenge the restrictions by alleging their impropriety notwithstanding their effect upon any property.[238] When someone challenges a zoning ordinance on its face, a number of circuits have held that it is not necessary to seek a variance.[239] Intuitively, this makes sense because a facial challenge raises the allegation that the regulatory scheme would be unconstitutional *no matter how it is applied*.[240] Nonetheless, if the property owner makes a facial challenge, the burden can be extraordinary.[241] The United States Supreme Court has required that the regulation must deny an owner economically viable use of his land before the

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237. "There are two quite different ways in which a statute or ordinance may be considered invalid 'on its face'—either because it is unconstitutional in every conceivable application, or because it seeks to prohibit such a broad range of protected conduct that it is unconstitutionally 'overbroad.'" Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789, 796 (1984).

238. *See* Pennell v. City of San Jose, 485 U.S. 1, 11 (1988) (finding a facial due process challenge to a rent control ordinance ripe although takings claim is not).

239. *See* Pearson v. City of Grand Blanc, 961 F. 2d 1211 (6th Cir. 1992); Eide v. Sarasota County, 908 F.2d 716 (11th Cir. 1990); Smithfield Concerned Citizens for Fair Zoning v. Town of Smithfield, 907 F.2d 239 (1st Cir. 1990) (finding that based on *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) ripeness is satisfied); Southern Pac. Transp. Co. v. City of Los Angeles, 922 F.2d 498 (9th Cir. 1990); Beacon Hill Farm Assoc. II Ltd. Partnership v. Loudoun County Bd. of Supervisors, 875 F. 2d 1081 (4th Cir. 1989) (deeming a facial challenge permissible whether or not a final determination as to the extent of the regulation); Greenbriar, Ltd. v. City of Alabaster, 881 F. 2d 1570 (11th Cir. 1989) (determining that substantive due process is denied the moment a governmental decision affecting property has been made in an arbitrary and capricious manner); Xikis v. City of New York, No. CV 89-2000 (ADS), 1990 WL 156155, at *1 (E.D.N.Y. Sept. 28, 1990). The purpose of the ripeness doctrine is "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." Abbott Lab. v. Gardner, 387 U.S. 136, 148 (1967).

240. *See Members of the City Council*, 466 U.S. at 797-98 ("[A] holding of facial invalidity expresses the conclusion that the statute could never be applied in a valid manner.").

241. *See* Hodel v. Virginia Surface Mining and Reclamation Assoc., 452 U.S. 264 (1981). A facial challenge presents no concrete controversy "concerning either application of the Act to particular surface mining operations or its effect on specific parcels of land. Thus, the only issue properly before the District Court and, in turn, this Court, is whether the 'mere enactment' of the Surface Mining Act constitutes a taking." *Id.* at 295.

In *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470 (1987), the Court described this type of challenge as an especially steep uphill battle. *See id.* at 495.

regulation can be regarded as a taking.[242] Regulations have withstood facial challenges when they were held to substantially advance legitimate governmental goals.[243] In order to challenge the regulation, the property owner must then convert the *facial* challenge to an *as applied* challenge by attempting to develop the property.[244]

Even if the challenge is *as applied,* the plaintiffs still face a formidable challenge. Ripeness is a significant limitation to mounting such a challenge to a regulation. As the United States Supreme Court observed in *Williamson County Regional Planning Commission v. Hamilton Bank,*[245] a claim is not ripe until the government has made a final decision regarding the implementation of the regulations on the property.[246] In *MacDonald, Sommer & Frates v. County of Yolo,*[247] the Court explained that this ripeness requirement was designed to judge the constitutionality of regulations that potentially limit development only after the nature and extent of the development is known.[248]

Thus, property owners seeking to challenge the land use regulation as applied to their property have to be in a position where application of the restriction precluded the intended uses of the property. In most instances, this would require some sort of meaningful development permit applications.[249] Of course, this supposes that the owners intended to build in the immediate future. Such is not the case where owners hold land for investment or where conditions do not merit immediate development. To have ripe taking claims, such property owners may be forced to enter into premature or "artificial" development schemes by making permit applications because such applications would be the only way to challenge the regulation and to preserve their property rights.[250]

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242. *See Keystone,* 480 U.S. at 495 (quoting *Agins v. City of Tiburon,* 447 U.S. 255, 260 (1980)).

243. *See, e.g., Agins,* 447 U.S. at 262 (holding regulation facially valid since it substantially advanced a legitimate government goal).

244. *See id.* "At this juncture, the appellants are free to pursue their reasonable investment expectations by submitting a development plan to local officials. Thus, it cannot be said that the impact of general land-use regulations has denied appellants the 'justice and fairness' guaranteed by the Fifth and Fourteenth Amendments." *Id.* at 262-63.

245. 473 U.S. 172 (1985).

246. *See id.* at 186.

247. 477 U.S. 340 (1986).

248. *See id.* at 351.

249. *See Agins,* 447 U.S. at 260 (finding no concrete controversy before the court where appellants have not submitted a plan for development of their property as the ordinances permit); *MacDonald,* 477 U.S. at 357.

250. Of course, requiring a final decision gives every incentive to government planners to "prolong the procedures as long as possible, for in delay they purchase unilateral insulation from accountability for their past conduct." Epstein, *supra* note 226, at 961.

However, submitting a development permit is no small feat, particularly where land use restrictions burden the property, thus necessitating the challenge in the first place. An application for a development permit may require the preparation of numerous documents, such as geologic surveys, archaeological surveys, and environmental impact reports.[251] The costs may amount to tens if not hundreds of thousands of dollars, depending on the scale of the project.[252] Even then, there is no certainty that one application will be sufficient or that the property owner will be able to successfully prosecute a takings challenge based on the denial of the one application.[253]

Another issue arising from the rule is its effect on the orderly administration of justice as property owners are forced to challenge every new regulation or risk the loss of value of increasingly burdened property.[254] This supposes that the property owners will overcome the ripeness obstacles in their path. The potential for a flood of permit applications should concern city and county governments as affected property owners attempt to ripen their claims by submitting development requests where, but for this rule, property owners might not have even contemplated development.[255]

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251. In California, as in most states, land development is subject to comprehensive environmental regulations. *See generally* PRACTICE UNDER THE CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEB Practice Guide 1996). The Environmental Impact Reports required before construction can begin cover an extraordinary number of issues. *See, e.g.*, A Local and Regional Monitor v. City of Los Angeles (UC Land Associates), 16 Cal. App. 4th 630, 642 (Cal. App. 2 Dist. 1993) (noting that the environmental impact report for one multi-phased project "discussed the project in terms of earth (grading, drainage, geologic hazards, and seismic), air (quality, and stationary sources), animal life, noise, light/glare, circulation (transportation, access, and driveway), energy conservation, water conservation, service system (storm drainage, sewers, and solid waste disposal), aesthetics, public services (fire, police, and emergency), land use, 'risk of upset/human health,' jobs, and housing"). In *Hunziker v. Iowa*, 519 N.W.2d 367, 369 (Iowa 1994), the property owners were prevented from using their property because an archaeological study revealed the presence of ancient human remains on the lot.

252. In one recent California case, the trial court noted that the property owner's development costs were nearly $1 million to process a tentative map and prepare a final map in order to subdivide its property. Furthermore, under development regulations, the property owner was required to pay additional impact and other fees of approximately $1 million and to obtain security of approximately $9 million "to secure faithful performance and payment to laborers and materials suppliers for public improvements and grading in order to obtain its final map." Penn Pacific Properties, Inc. v. City of Oceanside, No. N 54 355 (Sup. Ct. Ca San Diego, Aug. 19, 1996).

253. For a discussion of the "struggle" between courts in an attempt to resolve how many applications are required before a takings challenge to a land use regulation can be brought, see Michael M. Berger, *The "Ripeness" Mess in Federal Land Use Cases or How the Supreme Court Converted Federal Judges into Fruit Peddlers in* INSTITUTE ON PLANNING, ZONING, AND EMINENT DOMAIN § 7.03[2] (Southwestern Legal Foundation 1991).

254. *See Lopes*, 629 N.E.2d at 1315.

255. The owner in *Zealy* appears to have been caught in this bureaucratic entanglement. He negotiated with the city to provide sewer services to his property in contemplation of future residential development. However, because he had not actually started development,

C. *Time Cannot Cure Constitutional Infirmities*

In many states, mere acquiescence for whatever period of time does not legalize a usurpation of power in violation of rights protected by constitutional provisions.[256] However, a rule precluding a subsequent owner from challenging an existing land use regulation would stand this widely accepted principle on its head. Under such a rule, passing title to a subsequent owner would cure a land use restriction's constitutional infirmities. Only a person owning property when the legislature enacted the restriction could challenge it, assuming the owner overcomes the formidable obstacle of ripeness.

Under such a regimen, the alienation of property naturally occurring over the passage of time would result in the inability of any affected property owners to challenge even a land use restriction that is patently unconstitutional as applied. The definition of property rights would essentially be redefined by the government, thus accomplishing a defacto transfer of ownership interests to the state unfettered by constitutional limitations—the very problem of which Justice Holmes warned about in *Pennsylvania Coal v. Mahon*.[257] This also appears to be the case in *Hunziker v. State* where the Court held that a property owner never had the right to build on a site containing significant human remains.[258]

To the extent that a transfer of property insulates a land use regulation from being challenged, does the protection apply only to the sale of property or does it also apply to transfers that occur as a result of marriage, divorce, death, or creation of trusts? The New York Court of Appeals avoided resolving this issue.[259] However, a broad rule that redefines property and prevents subsequent owners from challenging land use restrictions probably would apply with equal force to *any* subsequent owner.[260]

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the Court dismissed his challenge to the rezoning action based on reliance. *See Zealy*, 548 N.W.2d at 534.

256. *See* Weinberger v. Board of Public Instructions, 112 So. 253, 255 (Fla. 1927); Trust Co. v. City of Chicago, 96 N.E.2d 499, 505 (Ill. 1951); Pressman v. D'Alesandro, 125 A.2d 35, 40 (Md. 1956); Farmer v. Town of Billerica, 409 N.E.2d 762, 763 (Mass. 1980); Dearborn TP. v. Dail, 55 N.W.2d 201, 204 (Mich. 1952); Filister v. City of Minneapolis, 133 N.W.2d 500, 503 (Minn. 1964); Rathbone v. Wirth, 45 N.E. 15, 20 (N.Y. 1896); Alliance for Progress, Inc. v. New York State Div. of Hous. & Community Renewal, 532 N.Y.S.2d 821, 825 (N.Y.Sup.Ct. 1988); Hamann v. Heekin, 102 N.E. 730, 732 (Ohio 1913); Pierce v. King County, 382 P.2d 628, 634 (Wash. 1963). *See also* Shepherd v. San Jacinto Junior College Dist., 363 S.W.2d 742, 762 (Tex. 1962) (Calvert, J. dissenting).

257. *See* 260 U.S. at 415.

258. *See supra* notes 102-20 and accompanying text.

259. *See Gazza*, 679 N.E.2d at 1038 n.3.

260. Courts are unlikely to fashion a categorical rule precluding many regulatory takings challenges. However, they may permit property owners to sell the right to sue for the

D. The Patchwork Application of Land Use Regulations

A rule precluding a subsequent landowner from challenging an existing land use regulation would foster the application of land use regulations in a patchwork fashion. It is not difficult to imagine a residential development where some property owners are able to challenge a land use regulation while their adjacent neighbors' claims are barred. Adding a few different regulations over a period of years could easily result in an extraordinary range of legal possibilities, depending on when and how often owners transfer a particular property. This rule would result in situations where one property owner could challenge regulation A but not B, another could challenge both, and still a third could not challenge either.[261]

VI. CONCLUSION

The Supreme Court's opinion in *Lucas* should have signaled an end to some states redefining property. Following the Supreme Court's decision in *Nollan*, the right of a subsequent acquirer of property to challenge existing land use regulations should have been beyond question. However, as the cases discussed in this article demonstrate, some courts do not correctly apply *Lucas* and *Nollan*. In the four New York cases—*Anello, Gazza, Basile,* and *Soon Duck* Kim—the emerging pattern seems less a misapplication than a categorical repudiation of *Lucas* specifically, and regulatory takings jurisprudence in general.

If the Fifth Amendment's Takings Clause is to have any meaning, decisions affecting its application must be universally understood and accepted. *Lucas* and *Nollan* should have been sufficiently clear, but apparently they were not. The remedy is not further uncertainty perpetuated by silence. Rather, our Supreme Court must expressly declare that *no person* shall be deprived of property without due process, and private property shall not be taken for public use,

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regulatory taking. This proposition seems all the more unlikely in light of the court's observation that

> once taken, those property interests are no longer owned by the private landowner and may not be sold by such party. Rather, a promulgated regulation forms part of the title to property as a pre-existing rule of State law. While the *remaining property* interests may still be freely transferred by the landowner, a purchaser's title is necessarily limited to and by those property interests alone.

Id. at 1039.

A reasonable interpretation of this passage is that a land use regulation as applied to property does not create a separate property interest in a takings suit that could be sold apart from the rest. It is not unreasonable to expect that had the question of whether the ability to sue for a regulatory taking could be sold were before the court, the court would have found no such right to exist.

261. *See Lopes*, 629 N.E.2d at 1315.

without just compensation. There can be no exceptions to the Takings Clause for new owners, nor can property be redefined any time a statute or ordinance is passed or a zoning decision made. Such conditions risk reducing the Takings Clause to a hollow shell.[262]

The Supreme Court can not continue to on opportunities presented by such cases as *Hunziker, Zealy,* or *Lopes.* The four New York cases—*Anello, Gazza, Basile,* and *Soon Duck Kim*—represented an opportunity for the Court to reaffirm the vitality of *Lucas.* The Court needs to declare that a state may neither legislatively alter the definition of property such that property owners are deprived of valuable property without just compensation, nor preclude property owners from challenging land use restrictions imposed prior to the time the property was acquired. The United States Supreme Court must address this issue, devoting more of the its attention to the subject than a single footnote, so that property owners cannot be deprived of their Fifth Amendment rights the moment they buy or sell their property.

262. *See* Epstein, *supra* note 226, at 957.